



Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Suite TW-A235
Washington, D.C. 20554

Re: Implementation of Section 224 of the Act, GN Docket No. 07-245

Dear Secretary Dortch:

Georgia Electric Membership Corporation (GEMC) is a non-profit, state-wide service organization for forty-two (42) electric membership corporations in Georgia and appreciates this opportunity to submit its response comments to the FCC regarding the recent FNPRM on implementation of section 224. Our 42 EMCs provide electric service to approximately 47% (4.46 million) of the state's population (9.5 million) in a service territory occupying approximately 73% of the state's land mass and they raise genuine concern to the FNPRM's three target areas being considered for changes: (1) expediting access to utility poles by telecommunications ("telecoms") and cable companies; (2) making attachment rates lower and more uniform; and (3) improving the pole attachment enforcement process.

While GEMC recognizes that our EMCs are exempt from FCC pole attachment jurisdiction, please consider our comments to be relevant because we are engaged with numerous "for profit" telecom and cable companies and want a voice based on our past history with these companies. GEMC also feels the FCC will benefit from the input of all pole owners and operators regardless of jurisdiction. Although GEMC stands in unison with National Rural

Electric Cooperative Association's (NRECA) comments, we offer up how the proposed rules will have a direct and indirect impact on our EMCs and their member-owners. Over the past 5 years, GEMC has conducted arms-length negotiations with major ILECs in Georgia, and with the Cable Television Association of Georgia (CTAG). GEMC currently has statewide model agreements for both traditional "joint use" with ILECs and "pole attachment agreements" with cable operators, both of which could be undermined by the FCC's FNPRM.

Comments on the Proposed Access Rules:

In the FNPRM, the FCC proposes rules to establish a five-stage timeline for attachment of new cables to poles with a provision allowing the Attacher to hire utility approved contractors to enforce the timeline. Although GEMC has negotiated terms and conditions that, in some cases, are more favorable for the attacher than the FCC's target guidelines, GEMC believes that a strict timeline is unrealistic without foreknowledge of the scope of the project and the work required to accommodate the attacher's request. GEMC asserts that any timeline requires substantial flexibility to account for varying field conditions, and that using 'certified' outside contractors in the power space, at the behest of the attacher, will unnecessarily shift the liability burden and cost to the electric rate payer.

Fixed Time Lines for Make Ready:

GEMC's model contract with CTAG provides that the EMCs will "*normally commence Make Ready Work within twenty (20) business days of receipt of Licensee's written acceptance of the Make Ready Estimate for such Make Ready Work and shall complete the Make Ready Work consistent with its standard work order process. Licensee may request expedited handling of EMC's work, and Licensee shall be responsible for the additional Actual Costs incurred by EMC for such expedited processing.*" GEMC believes that both parties – during arms length negotiations, reached an

acceptable solution to the response intervals for access to poles. In general, the concept of a broad-based, structured time-frame for make-ready work coupled with attacher's contracted electrical labor appears benign. The make-ready process is, however, fraught with variables that require substantial flexibility on a case-by-case basis, and create a risk of shifting the cost burden to the electric customer.

Further, GEMC's experience indicates that existing attachers, not the EMC pole owner, are often the primary delay in accommodation of new communications attachments. As an example, AT&T has existing facilities attached to more than 500,000 GEMC poles. AT&T's Georgia labor force is represented by the Communications Workers of America (CWA). Under the terms of AT&T's union agreement, all work "aloft", including makeready work, must be done by AT&T's traditional work force. AT&T, therefore, prohibits the EMC, or the new attacher's work force, from making simple rearrangements of AT&T's existing cables while either is performing its work necessary to accommodate the new attachment. Upon completion of work, the EMC notifies AT&T (normally through NJUNS) that it is "next to go", and thereafter AT&T's represented labor force is scheduled to perform AT&T's work on the subject pole. For presumably sound business reasons, AT&T has reduced its work force to a bare minimum, staffed solely (and perhaps barely) to serve its own subscriber's demands. Faced with limited resources, and the choice of completing one's own service request or that of a "new attacher", one can understand why an "existing attacher" might not rush to rearrange or relocate its existing facilities to accommodate a new entrant into the market – especially when that new attachment also represents competition for traditional or recently expanded services. Similar delays by all existing attached entities are commonplace. GEMC therefore applauds the FCC's recognition

that timelines are needed for existing attachers – as they are significant barriers to completion of makeready work.

GEMC believes, and therefore supports NRECA's position, that the record does not establish a need for strict timelines. In many instances, there is a failure in communication or a failure on the part of the Attacher driving untimely installations. NRECA's June 2010 survey reports that the average number of days from receipt of an attachment request to approval is twelve (12) days; and from approval to installation only twenty-two (22) days, less than the objective set by the FCC timeline. NRECA's survey also determined that Attachers created a large number of the issues that delay attachment including 1) not receiving all pertinent information from the Attacher necessary to make the pole ready and 2) not getting cooperation from existing Attachers to relocate their attachments. (See Exhibit 1 [NJUNS ticket] and Exhibit 2 [Picture depicting unperformed transfer of Exhibit 1] attached hereto and incorporated by reference noting transfer request of cable service provider over 12 months old.) There are also multiple occasions where attachers submit wrong attachment information or sparse attachment information. Georgia utilities attempted to mitigate many of these types of issues years ago, becoming early adopters of the National Joint Utility Notification System ("NJUNS"). GEMC believes that the NJUNS program, which is included in all of GEMC's statewide agreements (with both ILECs and other cable/telecommunications providers) has reasonably reduced problems the FCC now attempts to address through regulation.

Certified Outside Contractors on the Utilities' System:

Similarly the proposal wherein electrical systems must somehow certify and provide oversight to the attaching entities' contracted labor, unreasonably and unjustly places a

substantial risk to the safety and reliability of the electrical system and increases the likelihood of shifting costs to the electrical customer. As previously noted, the field conditions vary from pole-to-pole. Yet, beyond the desire to set defined time frames for make ready, attachers seek an independently operated stick to enforce their defined time lines. The theory being that if the utility delays outside of the time line, the attacher need only get utility contractors to do what the utility, for some selfish reason, fails to do. To alleviate the utility's concern for their infrastructure, the utility would carry the burden of *certifying* these contractors.

The utility then becomes responsible, both from a system perspective and a liability perspective, for work done by labor that it certified but had no right to contractually control. The electric rate payer would ultimately pay for these costs. Presumably, through this process the attaching entity gains control over assets of the electric utility by hiring and controlling the labor and materials used to perform make-ready, yet places the liability back on the electric utility through a 'certification' process but without contractual teeth to enforce utility requirements.

As NRECA and other electric utility organizations factually note, the average number of days from request to actual installment of the attachment is already below the number of days proposed in the NPRM. Furthermore, the same facts indicate that many of the delayed projects were a result of factors beyond the electric utility's control. Setting a fixed time line that triggers a right in the attaching entity to hire their own work force, effectively avoiding the electric utility's standards, safety requirements, and reliability constraints, beyond some initial certification process, sets up an improper juxtaposition between speed and the safety of the public and the system.

There also remain a number of cause and effect questions, such as (1) how these rules interplay with the electric utility's labor rules; (2) what safety rules would apply; (3) locale

specific safety and construction standards; (4) what remedies do the utilities have if there are violations of these rules; (5) and does implied labor on the electric utility impose a taking on its property, just to name a few.

Comments on the Proposed Telecom/CATV Rates

In the FNPRM, the FCC considers “reinterpret[ing]” the telecom rate by removing components of the formula that provide depreciation, tax costs, and rate of return to the utility.¹ The NPRM’s proposed pole rates and its uniform approach to all attachers does not fairly account for the cost of the pole or the operational cost to keep the pole in place and will not achieve the FCC’s overriding mandate of promoting broadband deployment.

Broadband deployment decisions are not based on pole rental costs, but rather on profitability potential.

Extension of Broadband into rural areas - arguably the most underserved - is based not on pole rental costs, but on revenue potential, construction costs, and financing costs. In fact, we would contend that pole rental costs are insignificant to the deployment of broadband. The FNPRM lacks substantial evidence supporting an assertion that investment decisions have been impacted by disparity in the pole attachment rates charged among the Attachers. Likewise, there appears to be little factual support of an assertion that its investment decisions, particularly those to expand broadband into underserved areas, have been greatly affected by the current rate structure.

¹ FNPRM §130.

The proposed pole rate schedule and uniform attachment expense approach will not significantly increase the deployment of broadband because it does not significantly alter the cost and risk models enough to encourage a provider to deploy into sparse areas. The Cable Telecommunications Association of Georgia (CTAG) explains on its website why cable operators do not serve the rural areas of Georgia. The following is taken directly from CTAG's website:

"Why Can't Cable Serve All Geographic Areas?"

Unlike electric and telephone companies that were provided subsidies by the federal government to serve sparsely populated areas, cable companies receive no such incentives. Cable companies, supported by private investors, not public funding, can only serve areas where they can expect reasonable return on their investment. It costs about \$30,000 on average, to construct one mile of fiber optic and coaxial cable plant. So, when a cable operator evaluates whether or not to build out – each project must stand on its own economic merit."²

As CTAG so succinctly explains, it is (1) the cost per mile to construct cable facilities, (2) the lack of governmental subsidies, and (3) an implied lack of demand (in the form of "economic merit", a.k.a., "customers/mile of plant") that are the driving factors in their decisions, which result in a lack of traditional cable services in rural areas. GEMC's basic analysis indicates that the breakeven for cable operators is approximately 23 subscribers/mile.³ While certain areas are fairly densely populated, GEMC's 2009 year-end average service density was 8.94 members per mile of line – well below GEMC's estimate of the subscribers required to stimulate an investment by a "for profit" cable company.

² www.gacable.com, FAQ's, "Why Can't Cable Serve All Geographic Areas?"

³ GEMC Analysis of Cable Costs and Revenues And the Impact of Pole Rental on Cable System Build-out

An additional consideration in the “investment” decision is the forecasted “take rate” for the cable operator’s service. The National Cable and Telecommunications Association’s website indicates that at year end 2009, only 47.8% of the “homes passed” nationally subscribed to cable’s video services.⁴ If the national average were to hold on GEMC’s system, only 4.3 GEMC members would subscribe to cable services. GEMC believes this is far below the threshold required to incent traditional cable operators to invest in “rural” America.

More importantly, GEMC’s overhead electrical system is supported by approximately 22 poles per mile of line. The pole rental costs (at the current rate in GEMC-CTAG’s model agreement) for attachments to 22 poles per mile, represent only 3.3% of our forecast of the total annual charges incurred by a cable system.⁵ GEMC estimates that elimination of pole rents entirely would create an insignificant improvement by changing the breakeven from 23 subscribers per mile to 22.6 subscribers per mile.⁶

GEMC understands the concepts of rural deployment better than most. For example, since the 1930’s, utility providers affiliated with the Rural Utilities Service (RUS) (its electric precursor was REA) have relied upon the “not-for-profit cooperative” model of member ownership serve rural America. The model has worked. Broadband providers avoid sparse areas for the same reasons that the investor-owned utilities failed to serve rural areas in the early 20th century. Whether it is the lack of density or the high cost to transmit signal, the similarities between power and data are clear.

A prime example of this is the fact that so many established telecommunications and cable providers are selling off rural, low density cable systems to startups and under-funded companies. In some cases these ‘purchasers’ of rural systems are hoping federal stimulus money

⁴ www.ncta.com, Industry Data, Availability

⁵ GEMC Analysis of Cable Costs and Revenues And the Impact of Pole Rental on Cable System Build-out

⁶ GEMC Analysis of Cable Costs and Revenues And the Impact of Pole Rental on Cable System Build-out

and other financial offsets will allow them to expand the basic systems purchased to provide broadband services. In several instances those “sold off” lower density systems are falling into bankruptcy, or the new owners are abandoning their efforts because of competition from satellite providers when the governmental factors don’t work out.

Over the past 3 years, several of Georgia’s EMCs have been forced to deal with abandoned systems left on EMC poles. The EMCs are then left with inoperable cable, poorly and improperly attached to their poles, and no one to pay the cost of removal. This is an unsatisfactory model for broadband delivery to rural areas.

GEMC is looking for partners, not renters, in constructing the essential infrastructure for our members in Georgia.

Joint use of poles should be a means of saving costs for all parties – those providing electric power as well as those providing communications. Georgia’s licensed and franchised communications companies are considered utilities, and as such they have access to state, county and city rights of way for the installation of their facilities. This includes the right to bury facilities, or to install their own poles to support aerial facilities. GEMC much prefers partners (instead of renters) who use qualified workers and contractors to construct and maintain their facilities in accordance with industry practices, the NESC, and OSHA’s standards.

GEMC would gladly attach to, and pay a fair rental for, space on NESC compliant poles owned by communications companies, and thereby share the savings and the burdens of pole ownership. GEMC’s agreements with the ILECs serving Georgia are traditional joint use agreements which contemplate parity of ownership of the joint use pole universe. At the beginning of GEMC’s 2007-2008 negotiations with CTAG, we proposed a similar joint use

contract, with equal responsibilities and equal access to each other's pole, as the basic form of agreement. GEMC's rationale was simple. Under a true joint use relationship, reliability, safety, response time, and costs are all improved through such a synergistic relationship. Unfortunately, CTAG declined, choosing instead to negotiate for traditional "pole attachment" terms and conditions.

Current and proposed pole rental rates do not fairly account for pole costs.

The NPRM's current and proposed pole rates, and its uniform approach to all Attachers, do not fairly account for the electric utility's cost of the pole or the operational cost to keep the pole in place. The FCC's newly proposed pole rates exacerbate the current formula under evaluation by eliminating essential components of the annual charge rate. Why would the FCC provide a savings to the Attachers at the expense of pole owner?

The result of lowering rental cost and reducing carrying charges will be the future installation of shorter poles adequate only for the pole-owning utility. This scenario will result in either multiple pole lines or excessive pole change outs (make ready time and money) in order to accommodate future attachments.

GEMC is concerned about the safety and reliability of our systems in Georgia.

A large portion of the costs incurred by pole attachers arises from improper and poorly maintained attachments to the pole. Georgia's EMCs are investing more time in the field inventory and safety inspection process because of numerous pending transfers, unauthorized attachments, and non-compliant attachments. (See Exhibit 3 [Picture of Comcast storage of excess fiber on Coweta-Fayette EMC's system near Newnan, GA], and Exhibit 4 [Picture of

Mediacom construction on Coweta-Fayette EMC's system] attached hereto). The FNPRM fails to address any of these costs or remedies to abate the costs or stop these practices.

If the FCC does proceed with subsidizing Attachers at the utility rate payer expense by artificially lowering pole rental rates, then the FCC should assure that these savings are re-invested in broadband expansion and not just the Attacher's bottom line. GEMC believes that none of the FCC's proposed changes will affect its stated purpose of broadband expansion by Attachers, but will only serve to enhance bottom line profits of these companies.

Comments on the Proposed Revision of the Enforcement Process

In the FNPRM, the FCC considers "whether...existing procedural rules governing...attachment complaints" should be modified to structure specialized forums to expedite dispute resolution claims and whether to modify or strip the 30-day deadline of Rule 1404(m) ⁷. The FCC furthermore considers whether to expand remedies such as imposing arbitrary compensatory damages where pole access is 'unlawfully' denied and specific performance authority to order pole access.⁸ GEMC is concerned that any revision to the Enforcement Process must be: (1) even-handed; (2) not act as a penalty shifting process; (3) must have subject matter jurisdiction; and (4) must provide a form of judicial process for compensatory claims and appeals.

Specialized Forums and the 30-day Deadline

⁷ FNPRM §78-79.

⁸ Id. §§85-88

The FCC's FNPRM discusses a possible structure and authority for a specialized forum to hear pole attachment complaints. The FNPRM discusses the need to expedite the dispute resolution process and promote efficiencies within the attachment complaint process through a substantial change in the dispute resolution process. The FNPRM, however, does not appear to discuss or point to specific issues or challenges the current process suffers. GEMC believes that the current process should remain intact until specific problems can be better identified.

Concerning the removal of the 30-day rule and expediting resolution, GEMC contends that any changes to these rules should encourage informal resolution of disputes and avail the parties to use Alternative Dispute Resolution processes where reasonable. Careful consideration should be given to removal of the 30-day rule to determine whether it will encourage dispute resolution without formal processes.

Compensatory and Specific Performance Damages

The FNPRM proposes to subject electric utilities to compensatory damages for (1) wrongful denial of access or delay in access to poles or, (2) for what the FCC considers unjust and unlawful terms and conditions for access. The proposed system seems inherently speculative and could lead to improper penalization without economic recourse. The current judicial options, open to either party, at least provide for evidentiary rules and a structure to ensure due process prior to penalization. Nothing in the NPRM appears to provide similar judicial assurances, injecting a great amount of insecurity into the attachment process. The proposed system appears inadequate compared to the remedies any of the parties currently contracting among themselves and needing legal remedy. The proposed damages run counter to common law contract damages which aim to make the parties whole while avoiding private party

rights to penalize a breach of contract. The FCC notes that its experience leads it to believe that rules limiting refunds to the date of the complaint fail to make the injured attacher whole.⁹ Yet, there is little support to prove that that this is true. GEMC is concerned that these proposed damage rules have the potential to become unfair, that the rules themselves exceed statutory authority, and that they could usurp the proper role of the judicial system.

The NPRM's proposals are one-sided and unbalanced, seeking to establish a process to penalize electric utilities while failing to address serious violations by attaching entities. NRECA's response cites a survey finding that 87% of surveyed electric utilities report finding unauthorized attachments. In these cases, the FCC has acknowledged that penalties that amount to back rent are unlikely to change behavior.¹⁰ Even more troubling is the rise of failed telecommunications systems that are leaving unsafe and improperly installed cable plant on the electric utility poles. Typically this abandoned plant is left to the electric utility to remove at very high expense while the former operators escape in bankruptcy or other similar methods. In many cases removal costs far exceed any cost sharing through the annual rental rates. Some recent issues involve stable telecommunications providers selling unprofitable portions (i.e. low density or poorly installed) portions of their systems off to underfunded or government funded startup companies that quickly dissolve leaving the electric utility holding the proverbial bag after they evaporate. Yet, the NPRM's proposals fail to fairly consider Attacher's liability in these cases or provide oversight for sale of telecommunications plant among providers and to new entrants into the marketplace. GEMC is concerned that the proposed damage rules, under direct supervision of the FCC, will provide the Attachers substantial and unfair remedy while completely failing to address the liability that Attachers are hanging on the utilities. While the

⁹ FNPRM §88.

¹⁰ Paragraph 94.

NPRM is lacking, there are some state rules and laws that do provide balance to the equation. Any rewrite of pole attachment rules, if any, should include FCC provisions to address and penalize unsafe or improperly installed attachments as well as oversight into transactions involving telecommunications plant. GEMC believes that a balanced approach will incentivize both pole owners and attachers to cooperate as well as deter improper interaction. Likewise GEMC contends that any action taken by the FCC should allow and improve the process wherein pole owners can enforce their contractual rights to unauthorized attachments which is a far greater problem thus far.

Ultimately, any changes to the dispute resolution process should be even-handed and fair to both sides, avoid penalization while striving to make parties whole, and should utilize the formal and non-formal dispute resolution process. Consideration of the problems that utilities are facing from Attachers should likewise be integrated into any consideration.

Conclusion

The FCC's FNPRM appears unbalanced and unfairly slanted toward telecommunications and cable companies. Nonetheless, the FCC is charged with maintaining fairness while promoting deployment of critical infrastructure. While GEMC concurs that telecom services are "quality of life services" for our electric consumers, we insist that safety or reliability can not be compromised in order to expedite the build out of this infrastructure, nor do we promote subsidizing "for profit" telecom or cable companies by lowering pole rental rates while our cooperatives' costs to install and maintain the structures continues to increase. Rules to promote these concepts should be factually based. GEMC is concerned that many of the proposed

changes in this FNPRM will increase the cost and liability of operating a reliable electric network, while providing no meaningful incentive for deployment of rural broadband. GEMC believes that many of the changes under consideration will ultimately impact our member-owners negatively with increased electrical costs while compromising reliability and safety in the process.

If the FCC determines to proceed, however, any rule changes should (1) provide great flexibility in the make-ready regulations; (2) permit the imposition of penalties equally on all parties who do not play fair, make remedies that make the parties whole, and keep the appeals processes already available to parties intact; and (3) recognize and remedy attachment practices that endanger our employees and the public and add to electric utilities' costs. Finally, the FCC should avoid the compensatory damages scheme under consideration.

Respectfully,

A handwritten signature in black ink, consisting of a stylized, cursive 'B' followed by a long, horizontal, wavy line extending to the right.

Bill Verner
Vice President of External Affairs
Georgia Electric Membership Corporation

PT Project 3

PT Project Name

Ticket #	422128	Pole Owner	GRS70
Ticket Creator	GRS70	House/Street #	
Date Created	3/7/2006 8:28:54 AM	Street/Road Name	
Company	Greystone Power Corp.	Pole #	
Member Location	DOUGLASVILLE, GA	X Coordinate	
Engineer	BUTCH HORN	Y Coordinate	
Phone	770-370-2455	Work Requested Date	4/7/2006
Phone Ext		Priority	1
State	Georgia	Status	Open
County	Douglas	Misc ID	
Place	Douglasville	Next To Go	COMDO

Remarks:

Burnt Hickory Road, 1577; AT ROAD

Step No	Member	# Poles	Job ID	Requested Date	Updated Date	Status	Job Type	Pole No	X	Y
1	COMDO	1	4141	9/21/2006	2/22/2007	Pending	TRANSFER			
TRANSFER COAX AT 12" ABOVE BST...PER USS INSPECTION, 2/22/07 WORK NOT COMPLETE, PLEASE TRANSFER										
2	USS	1	4141	10/5/2006	9/7/2006	Pending	PULL POLE			
PULL										

EXHIBIT 2



Exhibit 3



EXHIBIT 4

